FOIP #128

Alberta Government Submission to the Select Special Freedom of Information and Protection of Privacy Act Review Committee

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Contents

Introduction

Scope of the *Act*
Criteria for inclusion 2

Records and Information to which the *Act* Applies
Exclusion for information in a registry where public access is normally permitted 4

Technical amendments
Exclusion for vital statistics information 5
Exclusion for personal records of members of the governing bodies of local public bodies 5

Access to Records
Business information relating to a non-arm's length transaction between a public body and another party 6

Technical amendments
Disclosure of personal information harmful to an applicant's health or safety 6
Notice not required for information available to the public 7
Notice relating to fees 7

Protection of Privacy
Disclosure of business contact information 8
Disclosure of personal information in decisions of administrative tribunals 9
Disclosure of personal information contained in the Motor Vehicle Registry database 10

Technical amendments
Disclosure of hospital admission information 11
Access to third party personal information for research purposes 12
Disclosure of personal information for the purposes of a fatality inquiry 12
Right to request correction of personal information 12

Privacy in the Electronic Age
Respecting privacy in multi-channel service delivery 13

Technical amendment
The *FOIP Act* and the *Electronic Transactions Act* 15

Disclosure of Information in Archives

Technical amendments
Disclosure by the Provincial Archives of Alberta 16
Disclosure by the archives of a post-secondary educational body 16

Administration of the *Act*
Duty to publish directory 17
Review of the *Act* 18

Technical amendment
Access to manuals 19

INTRODUCTION

This submission is made by Alberta Government Services as the Ministry responsible for the *Freedom of Information and Protection of Privacy (FOIP) Act*. It is based on extensive consultation with departments, as well as discussions with agencies, boards and commissions of the Government of Alberta and FOIP Coordinators from several local public body networks.

Overall, the Government believes that the *FOIP Act* is working well in promoting open and accountable government and in protecting personal privacy. The issues addressed in the submission have either come to light in the course of administering the *Act* during the period since the last review in 1998-99 or have been identified as emerging issues during the consultation. A number of items, which are identified in this submission as technical amendments, propose updating, clarification, harmonization with other Acts and other minor improvements to the *FOIP Act*.

The amendments proposed in this submission are intended to ensure that the *Act* continues to be relevant and current and not to lessen rights of access or the protection of personal privacy presently provided by the *Act*.

The submission is presented using the same framework as the Committee's discussion guide, *The Freedom of Information and Protection of Privacy Act: Looking Ahead*.

SCOPE OF THE *ACT*

Criteria for inclusion

The *FOIP Act* applies to "public bodies," including

- departments, branches or offices of the Government of Alberta (**section 1(p)(i)**), and
- agencies, boards, commissions, corporations, offices or other bodies designated as public bodies in the regulations (**section 1(p)(ii)** and **Schedule 1** of the FOIP Regulation).

The criteria for the designation of agencies, boards and commissions in **Schedule 1** were established in Government policy in 1995. These criteria were stated as follows:

- the Government appoints a majority of members to the body or to the governing body of the organization,
- the body is wholly financed through the General Revenue Fund, or
- the Government holds a controlling interest in the share capital of the organization.

The Select Special Committee that reviewed the *FOIP Act* in 1998-99 recommended that the criteria for the inclusion of agencies, boards and commissions under the *Act* be set out in statute or regulation rather than in Government policy (Recommendation 9).

A regulation-making power was added to the *FOIP Act* (**section 94(1)(b)**) in 1999 to allow for the implementation of this recommendation. However, in the process of developing a regulation, it emerged that there was a need to review the current criteria for inclusion in **Schedule 1**, as well as the criteria for removing a public body from **Schedule 1** (**section 94(2)**).

Government Services performed this review of the criteria and developed guidelines for inclusion in **Schedule 1** during preparation of the 2001 FOIP Amendment Regulation. In the course of developing the guidelines it became clear that, since the existing criteria were first formulated (by the Ontario Commission on Freedom of Information and Individual Privacy in the 1980), the structure and financing of many government agencies have changed, and very few of them rely exclusively on government funding. In addition, it was found that the amount of funding from sources other than Government may change from year to year. As a result, the guidelines proposed a lower threshold for Government funding, taking into consideration projections for funding over the next few years.

The guidelines developed in 2000-2001 proved very successful in ensuring the consistent application of the more inclusive criteria. However, the review also indicated that the criteria require some flexibility, especially with regard to funding,

since Government ministries are involved in different kinds of funding arrangements that were not contemplated when the existing criteria were developed.

The intention of adding the criteria to the FOIP Regulation is to promote transparency, not to change the way in which these criteria are currently being applied. The definition of a "public body" in the *Act* should continue to apply. That is, an agency, board, commission, corporation, office or other body would be included only when specifically designated in the Regulation (**Schedule 1**).

Recommendation 1

That the criteria for the inclusion of Government agencies, boards and commissions be established in regulation. The regulation should allow for some flexibility with respect to the funding of the entity, such that an entity is designated only if it receives the majority of its continuing funding from Government. The criteria would be:

- the Government appoints a majority of members to the body or to the governing body of the organization,
- the body receives the majority of its continuing funding from Government, or
- the Government holds a controlling interest in the share capital of the organization.

That the criteria for removal of a **Schedule 1** body be amended to be consistent with the new regulation.

Recommendation 11 in the Final Report of the last Select Special Committee was that the criteria for inclusion should be expanded to include bodies whose primary purpose is to perform functions under an enactment.

In the process of developing a regulation setting out the criteria for the inclusion of Government agencies, boards and commissions (Recommendation 9 in the Report), consideration was also given to this related recommendation to expand the criteria for inclusion.

It was recognized that further research was needed to identify and consult with organizations that would be captured by an expansion of the scope of the *Act*. The situation was complicated by the fact that federal private sector privacy legislation was in development. This legislation is now in force for the federally regulated private sector and will take effect for the provincially regulated private sector by 2004, unless the Province passes substantially similar legislation. If the scope of the *FOIP Act* is expanded, it is possible that some organizations might find themselves captured by both public sector and private sector privacy legislation.

It has therefore been proposed that the Government take a phased approach to expanding the scope of the *Act*. The first phase would be to allow for, but not require, the designation of organizations that perform statutory functions within **Schedule 1** of the FOIP Regulation. Ministries would be required, as part of the legislative planning process, to consider whether a new entity should be subject to the *FOIP Act* according to criteria developed in policy. Ministries would also be asked to review legislation, agreements and contracts under which organizations perform statutory

functions within a reasonable period of time. After the Government has been able to assess the implications of applying the *FOIP Act* to these organizations and, in particular, to assess the effect of private sector privacy legislation, formal criteria would be established. The criteria would be enabling rather than prescriptive so that delegated administrative organizations could be added to **Schedule 1** if, on a case by case basis, the responsible ministry determined that the addition was appropriate.

Recommendation 2 That the *Act* and the Regulation be amended to allow for, but not require, the designation of delegated administrative organizations in **Schedule 1**.

That criteria for the inclusion of these organizations be established in policy and not included in the Regulation.

RECORDS AND INFORMATION TO WHICH THE *ACT* APPLIES

Exclusion for information in a registry where public access is normally permitted

The *FOIP Act* (**section 4(1)(l)**) does not apply to a record made from information in

- the personal property Registry,
- the office of the Registrar of Motor Vehicle Services,
- the office of the Registrar of Corporations,
- the office of the Registrar of Companies,
- a Land Titles Office,
- an office of a district registrar as defined in the *Vital Statistics Act*, or
- a registry operated by a public body where public access to the registry is normally permitted.

Some Government departments rely on the *Act*'s exclusion for information "in a registry operated by a public body where public access to the registry is normally permitted" (**section 4(1)(l)(vii)**) to disclose to members of the public personal information in registers relating to the operation of regulated activities. Municipalities also rely on the exclusion to disclose personal information in registers of local businesses.

It has been suggested that the wording of this exclusion does not provide sufficient statutory protection for personal privacy. That is because it appears that a public body could designate any collection of personal information as a "registry" and so remove it from the scope of the *Act*.

When the Select Special FOIP Act Review Committee considered registry information in 1998-99, it recognized that registries had historically served the purpose of making certain information (including certain personal information relating to property, licences, permits, etc.) available to the public in order to promote legitimate public and private interests. The Committee concentrated primarily on the registries operated by Alberta Registries (see the Committee's Final Report, Recommendation 18); it did not consider **section 4(1)(l)(vii)** in any detail.

In *Order 2001-029*, the Acting Information and Privacy Commissioner interpreted the word "registry" to mean a "a book authorized or recognized by law, kept for the recording or registration of facts or documents." This definition restricts the interpretation of what constitutes a registry for the purposes of **section 4(1)(l)(vii)**.

Recommendation 3 That **section 4(1)(l)(vii)** be amended to make this exclusion applicable only to registries authorized or recognized by law to which public access is normally permitted.

Technical amendments

Exclusion for vital statistics information

In a recent Order (*2001-014*), the Acting Information and Privacy Commissioner suggested that the current exclusion for "a record made from information in an office of a district registrar as defined in the *Vital Statistics Act*" **(section 4(1)(vi))** is unclear. He offered an interpretation that he believed more accurately represented the intention of this exclusion. Following *IPC Order 97-017*, he found that the term "office" referred to the person's official capacity and the functions and duties associated with the position, and includes other persons performing duties associated with the office. He decided that the reference in **section 4(1)(l)(vi)** meant Vital Statistics Services as a whole.

Alberta Registries agrees with the Commissioner's interpretation and has requested that the *FOIP Act* be amended to read "in an office of the Director or a district registrar as defined in the *Vital Statistics Act*."

Recommendation 4 That **section 4(1)(l)(vi)** be amended to read "in an office of the Director or a district registrar as defined in the *Vital Statistics Act*."

Exclusion for personal records of members of the governing bodies of local public bodies

When the *FOIP Act* was amended following the legislative review in 1999, **section 4(1)(n)** was added. This provision excludes from the scope of the *Act* personal records of appointed members of the governing bodies of local public bodies. It was

subsequently noted by Alberta Learning that certain governing bodies of post-secondary educational bodies (academic councils and general faculties councils) have elected members whose personal records should be excluded from the scope of the *Act* in the same way as the personal records of elected members of local public bodies **(section 4(1)(m))**.

Recommendation 5 That **section 4(1)(n)** be amended to parallel **section 4(1)(m)** by excluding "a personal record of an appointed or elected member of the governing body of a local public body."

ACCESS TO RECORDS

Business information relating to a non-arm's length transaction between a public body and another party

The *FOIP Act* requires a public body to refuse to disclose information to an applicant if disclosure would be harmful to the business interests of a third party. However, **section 16(3)(c)** says that this mandatory exception does not apply if the information being disclosed relates to a non-arm's length transaction between the Government of Alberta and another party. This provision applies in circumstances where the Government of Alberta is a direct participant in a transaction and is working with the other party. It is meant to ensure that the transactions between public bodies and other parties are transparent. However, it refers only to the Government of Alberta, which has been understood to mean departments, branches and offices of the Government of Alberta (since the Government of Alberta only contracts through its ministries).

It does not refer to other public bodies, including local public bodies. Since the rationale for **section 16(3)(c)** is that there should be transparency in such transactions, it should apply to non-arm's length transactions between local public bodies and other parties.

Recommendation 6 That **section 16(3)(c)** be amended to refer to a "public body" rather than to the "Government of Alberta."

Technical amendments

Disclosure of personal information harmful to an applicant's health or safety

The head of a public body may refuse to disclose to an applicant his or her personal information if the disclosure could reasonably be expected to result in immediate and grave harm to the applicant's health or safety **(section 18(2)** of the *FOIP Act*). The

decision must be supported by the opinion of a physician, chartered psychologist, psychiatrist or other appropriate expert.

Under **section 5** of the FOIP Regulation, the head of a public body may disclose information about the mental or physical health of the applicant to a medical or other expert. **Section 5** says that the public body must have an agreement in place to ensure that the expert maintains the confidentiality of the information provided. It also says that, if a copy of any record is provided to the expert, it must be returned to the public body or disposed of in accordance with the agreement.

Information about the mental or physical health of the applicant falls within the definition of "health information" under the *Health Information Act*. If the expert that is asked to provide the opinion is a "custodian" under the *Health Information Act*, the use and disclosure of information about the mental or physical health of the individual is governed by the *Health Information Act*. **Section 5** of the FOIP Regulation needs to be amended to recognize that custodians can only use and disclose health information in accordance with the *Health Information Act*. For example, the requirement for an expert to enter into an agreement with the public body relating to the confidentiality of the information does not enable the expert to carry out his or her mandatory duties under that *Act* respecting the use and disclosure of health information.

Recommendation 7 That **section 5** of the FOIP Regulation be amended so that the requirement to enter into a confidentiality agreement does not apply to a medical or other expert that is a custodian under the *Health Information Act*.

Notice not required for information available to the public

The language of this provision is unclear. The intent is that the third party notice provision should not apply to information that is to be made publicly available. If the information is not made publicly available within the 60-day time limit, and the request is reconsidered, then the notice provisions may be applicable.

Recommendation 8 That the language of **section 30** be amended to make it clear that third party notice is not required if **section 29(1)** applies to the information.

Notices relating to fees

The head of a public body may excuse an applicant from paying all or part of a fee under certain circumstances specified in **section 93(4)** of the *FOIP Act*. **Section 93(5)** states that, if an applicant has requested the head of a public body to excuse the applicant from paying all or part of a fee, and the head of a public body has refused the applicant's request, the head must notify the applicant of the right of review by the Information and Privacy Commissioner.

Section 83 of the *Act* specifies the manner in which a public body must provide this notice. The *Act* does not expressly state either that the applicant must make the request for a fee waiver in writing or that the head must notify the applicant of his or her decision in writing. The *Act* does specify that a request for access to information must be in writing **(section 7(2))**.

It is important for the administration of the *Act* that matters requiring a decision of the head, and decisions of the head themselves, be communicated in writing. (Under the *Electronic Transactions Act* [not yet proclaimed in force], information "in writing" would include information in electronic form that is accessible so as to be usable for subsequent reference.) If there is a request for a review by an applicant, a record of the communication is then available for consideration by the Commissioner. The FOIP *Guidelines and Practices* manual provides a sample letter for public bodies to use in refusing a request for a fee waiver.

Recommendation 9 That **section 93** be amended to clarify that a request for a fee waiver must be made in writing and that the decision of the head must be communicated in writing.

PROTECTION OF PRIVACY

Disclosure of business contact information

The definition of "personal information" in **section 1(n)(i)** includes the individual's name, business address or business telephone number. The definition does not currently include the individual's fax number or e-mail address; however, the list of types of personal information in **section 1(n)** is not intended to be exhaustive. All of this personal information is commonly found on an individual's business card. It can be argued that an individual intends to make his or her own business contact information widely available through the distribution of a business card.

Section 17(1) states that the head of a public body must refuse to disclose personal information if the disclosure would be an unreasonable invasion of a third party's personal privacy. **Section 17(2)** tells public bodies when the disclosure of personal information would not be an unreasonable invasion of a third party's personal privacy. **Section 17(5)** states that the head of a public body must consider all relevant circumstances in determining whether a disclosure of personal information constitutes an unreasonable invasion of personal privacy, including the circumstances noted in **section 17(5)(a) to (i)**.

Given that individuals generally intend to widely distribute their business contact information, it is proposed that the *FOIP Act* be amended so that the disclosure of business contact information is not considered to be an unreasonable invasion of personal privacy under **section 17(2)**. Alternatively, the *Act* could be amended so that one of the relevant circumstances that public bodies must consider in determining whether disclosure of personal information constitutes an unreasonable invasion of

personal privacy is that the personal information being disclosed is business information only and does not reveal other personal information about the third party.

Recommendation 10 That the *Act* be amended to allow for the routine use and disclosure of an individual's name, business address, business telephone and facsimile numbers, business e-mail address, and other business contact information.

Disclosure of personal information in decisions of administrative tribunals

Ministries are responsible for a very diverse array of administrative tribunals that decide matters ranging from individual benefit levels to labour disputes to compensation for access to privately owned land for drilling. In some cases, the decisions of these tribunals have a significant value as precedents for subsequent decisions; in other cases, the decisions are considered to apply narrowly to the facts of the specific case and to have little precedential value. In some cases, the decisions are routinely filed with the court and made available to the public; in other cases, the decisions would not be made available because disclosure would be considered an unreasonable invasion of personal privacy.

Under the *FOIP Act*, the Information and Privacy Commissioner must not disclose personal information in the course of an investigation or an inquiry if the head of a public body would be required or authorized to refuse to disclose that information (**section 59(3)**). The only exception to this prohibition is that information may be disclosed in the course of a prosecution, application for judicial review or an appeal of a decision on judicial review (**section 59(5)**).

Most other statutes that establish administrative tribunals are silent on the subject of disclosure of personal information in reasons for decisions and there is no provision in the *FOIP Act* that specifically allows disclosure of personal information in these decisions.

This is emerging as an issue because of the increasing demand for electronic publication of all records relating to judicial and quasi-judicial proceedings. The debate on court records in both Canada and the United States over the past year has provided a rehearsal of many of the arguments concerning the appropriate balance between transparency and personal privacy.

It has been suggested that a provision enabling, but not requiring, disclosure of personal information in reasons for decisions of administrative tribunals should be added to **section 40** of the *FOIP Act*. It has also been suggested that it would be more appropriate, in terms of transparency and consistency, for any authorization or requirement to disclose personal information in decisions to be in the legislative instrument that governs the administrative tribunal. Under these circumstances, **section 40(1)(f)** of the *FOIP Act*, which permits disclosure in accordance with an enactment of Alberta or Canada, would allow disclosure of the personal information.

In view of the practical difficulties of amending a number of Acts separately, consideration might be given to an omnibus bill to deal with amendments relating to a number of administrative tribunals at the same time.

Recommendation 11 That authority for disclosure of personal information in decisions of administrative tribunals be established in the tribunal's governing legislation.

That consideration be given to facilitating the amendment of affected Acts through the use of an omnibus bill, in which legislation could be included at the request of individual ministries.

Disclosure of personal information contained in the Motor Vehicle Registry database

From time to time, Alberta Registries receives requests for the disclosure of personal information that may serve a purpose for which there is some public support. Records made from information in the Office of the Registrar of Motor Vehicle Services are excluded from the application of the *FOIP Act.* In the Audit Report authored by the Offices of the Auditor General and the Information and Privacy Commissioner, it was confirmed that Alberta Registries must collect personal information in accordance with the *FOIP Act*, but the records are not subject to the use and disclosure rules in the legislation. It was recommended however that Registries should follow fair information practices, notwithstanding the exclusion from the *FOIP Act.*

For example, an organization may request personal driving and motor vehicle information relating to third parties (specifically, names and addresses). Under section 8(2) of the *Traffic Safety Act* (not yet proclaimed in force), this information must not be disclosed unless the disclosure is permitted under **section 40** of the *FOIP Act*. The organization requesting the information may argue that the disclosure is in the interest of the individuals whose information is being requested, that the disclosure would not be harmful to the individuals concerned, or that the disclosure is in the public interest, and that for one of these reasons the disclosure should, therefore, be permitted. In these circumstances, it has been suggested, there is a need for some flexibility to allow a specific request to be considered on its merits.

It is proposed that the *Traffic Safety Act* (section 8(2)) be amended to remove the reference to **section 40** of the *FOIP Act* as it relates to information concerning individuals (e.g. names and addresses collected for operator and vehicle licensing purposes), and instead list specific criteria whereby the Registrar could disclose personal information. It is further proposed that a new subsection be added to the *Traffic Safety Act* stating that a decision of the Registrar to disclose personal information can be reviewed by the Information and Privacy Commissioner. The *FOIP Act* would also have to be amended to include this authority in **Part 4** and **Part 5**.

It is also proposed that Alberta Registries post appropriate notification in the Registry Agent's premises that advises Albertans of the organizations to whom their personal information may be disclosed.

Recommendation 12

That the *Traffic Safety Act* be amended to delete the reference to **section 40** of the *Freedom of Information and Protection of Privacy Act* as it relates to information concerning individuals (e.g. names and addresses collected for operator and vehicle licensing purposes) and prescribe specific criteria for permitting the disclosure of personal information from the Motor Vehicle Registry by the Registrar.

That a new subsection be added to the *Traffic Safety Act* allowing a decision of the Registrar to be reviewed by the Information and Privacy Commissioner.

That the *Freedom of Information and Protection of Privacy Act* be amended to give the Commissioner the appropriate authority to review the Registrar's decision, investigate complaints, hold an inquiry into the matter and issue an order.

Technical amendments

Disclosure of hospital admission information

Section 17(2)(j)(ii) of the *FOIP Act* was added in 1999 to allow for disclosure, under certain circumstances, of the fact that an individual had been admitted to a health care facility as a current patient or resident.

In April 2001, the *Health Information Act* came into force, and information about the name and location of a patient or resident in a health care facility now falls within the definition of "registration information," which is a type of "health information" under the *Health Information Act*. Public bodies such as regional health authorities or nursing homes that are custodians under the *Health Information Act* must only disclose individually identifying health information in accordance with the provisions of that *Act*.

It is possible that other public bodies that are not custodians under the *Health Information Act* may be relying on **section 17(2)(j)(ii)** to provide information on the admission of an individual to a hospital following an accident or after ambulance transportation. However, this was not the intent of the provision and disclosure of this information by non-health care bodies may not be advisable since the information may not be current or accurate.

Even without **section 17(2)(j)(ii)**, non-health care public bodies (e.g. schools, post-secondary educational institutions) would be permitted to disclose information about an individual's admission to a health care facility so that a spouse, relative or friend of an injured, ill or deceased individual may be contacted (**section 40(1)(s)**).

Recommendation 13

That **section 17(2)(j)** be amended by deleting the provision for disclosure of the fact that an individual has been admitted to a health care facility as a current patient or resident (**section 17(2)(j)(ii)**).

Access to third party personal information for research purposes

The *FOIP Act*'s exception for disclosure of third party personal information (**section 17(2)(d)**) states that it is not an unreasonable invasion of a third party's personal privacy if the disclosure is for research purposes and is in accordance with **section 42 or 43**.

This provision is not needed for two reasons. First, **section 42** allows for disclosure of personal information under a research agreement that sets out stringent conditions relating to the confidentiality of the personal information. Disclosure of personal information would be a different process from disclosure in response to an access request and is more appropriately done in accordance with the *Act*'s provisions for disclosure under **Part 2**.

Second, **section 43** allows for disclosure by the archives of a public body and is either (a) subject to restrictions and then unconditional in terms of subsequent use or disclosure or (b) in accordance with the conditions set out in **section 42**. In either case, the disclosure would not be in response to an access request.

Recommendation 14 That **section 17(2)(d)** be deleted.

Disclosure of personal information for the purposes of a fatality inquiry

There is currently no provision, either in the *Fatality Inquiries Act* or in the *FOIP Act*, for disclosure of personal information for the purposes of a fatality inquiry. As a result, the Medical Examiner must issue a subpoena for information needed for the inquiry. Public bodies would like to be able to provide information to the Medical Examiner voluntarily. It is not intended that public bodies should be permitted to disclose this information to third parties.

It has been proposed that a new provision to this effect be added to the *Fatality Inquiries Act*, since the *FOIP Act* is intended to lay out the general principles rather than to supplement other Acts. However, since amendments to the *Fatality Inquiries Act* will not be made for some time, it has been suggested that, as an interim measure, a new provision be added to the *FOIP Act*.

Recommendation 15 That a provision be added to **section 40** of the *Act* to permit a public body to disclose information to the Medical Examiner for the purposes of a fatality inquiry.

Right to request correction of personal information

Under **section 36(1)**, an "applicant" who believes there is an error or omission in the applicant's personal information may request the head of the public body that has the

information in its custody or under its control to correct the information. **Section 1(b)** of the *FOIP Act* defines an "applicant" to mean a person who makes a request for access to a record under **section 7(1)**. Given the definition of "applicant," using the word "applicant" in the section referring to requests for correction may make it appear that a request for access to personal information must first be made to the public body before the request for correction can be dealt with.

It has been suggested that the provision for requests for correction should apply to an "individual." It is not recommended that the definition of "applicant" in **section 1(b)** be expanded to include requests for correction, since there are over 50 other provisions of the *Act* that use the term "applicant," such as the exceptions and the provisions relating to burden of proof, assessment of fees and third party notice. Changing the definition of "applicant" in **section 1(b)** could have unintended consequences, such as making it appear that fees could be charged for requests for correction.

In drafting the amendment, other provisions of the *Act* dealing with the correction request process should be reviewed to avoid potential inadvertent conflicts within the *Act*.

Recommendation 16 That **sections 36(1)** and **37(2)** be amended so that an "individual," rather than an "applicant," may make a correction request.

PRIVACY IN THE ELECTRONIC AGE

Respecting privacy in multi-channel service delivery

In 2002, Service Alberta will launch a Call Centre and web site to provide Albertans with one window access to information about Alberta Government programs and services. Through the Call Centre or web site, Albertans can be referred, linked or transferred to program areas to obtain more in-depth program information, if needed. Wherever possible, information and communications technology will be used to link Service Alberta with ministry call centres and web sites, so that seamless service is provided.

Respecting Albertans' privacy rights and ensuring that individuals can exchange their personal information and conduct transactions in a secure environment is critical to the success of Service Alberta. It will also be critical to the success of other initiatives that may be implemented in the future to enhance this multi-channel service delivery model.

Under Service Alberta policy guidelines, personal information will be used or disclosed only at the request or with the consent of the individual or as required by law. In addition, Albertans will receive an explanation of how their personal information will be used. Under the current consent requirements in the *Act*, the only

valid consent is an informed, written one. However, oral consent is necessary to enable call centres to operate effectively.

Oral consent raises issues for public bodies in terms of the potential for increased liability, the need to authenticate the identity of the individual and the need to inform the individual about the intended uses of his or her information. In order to provide for oral consent, the use and disclosure provisions of the *Act* that now refer to consent "in writing" would need to be amended to refer to consent "as prescribed in the regulations." The regulations would state what the functional requirements would be for both written and oral consent. The regulations would also provide new standards for authentication and notification, in the case of oral consent.

Recommendation 17 That the references in the *Act* to "consent in writing" (**section 17(2)(a)**) or "consent in the prescribed form" (**sections 39(1)(b) and 40(1)(d)**) be changed to "consent as prescribed in the regulations."

That the Regulation be amended, in consultation with the Information and Privacy Commissioner, to

- state the functional requirements for both oral and written consent,
- explicitly provide for electronic consent (consent in writing includes electronic consent under the *Electronic Transactions Act*), and
- set new standards for authentication of identity and notification for oral consent.

A recent survey by the Office of the Information and Privacy Commissioner found that Albertans are very concerned about the privacy of their personal financial information. While this information is already protected by **section 17** of the *FOIP Act*, it has been suggested that, for greater certainty, the *Act* should be amended to expressly state that it is an unreasonable invasion of personal privacy to disclose the personal financial information of a third party.

Given the concerns of citizens about the privacy of their personal financial information, it is not surprising that one of the barriers to the expansion of online business transactions is the concern of users about the safety and security of their credit card information. The *FOIP Act* can support e-government initiatives by specifically protecting an individual's credit card information. It is therefore further proposed to add a provision stating that it is presumed to be an unreasonable invasion of a third party's personal privacy to disclose an individual's credit card number.

This recommendation is not intended to apply to credit card transactions or to undermine the current right of Albertans to access certain financial information of public body officials, such as expense account information. It will, however, ensure that credit card numbers are not disclosed without consent when they are in records subject to an access request.

Recommendation 18 That **section 17(4)** be amended to state that it is presumed to be an unreasonable invasion of personal privacy to disclose personal financial information, including bank account information and credit card numbers.

Technical amendment

The *FOIP Act* and the *Electronic Transactions Act*

When Alberta's *Electronic Transactions Act* comes into force, it will allow public bodies to conduct transactions electronically, subject to certain rules relating to "functional equivalence." This will allow public bodies that require certain information "in writing" to accept the information in electronic form.

For the most part, the *FOIP Act* is medium-neutral and poses no barrier to the implementation of the *Electronic Transactions Act*. However, two provisions in the *FOIP Act* are exceptional in requiring that notice of the disclosure of third party personal information or confidential third party business information be "mailed to the last known address of the third party." These provisions are:

- **section 17(2)**, which states that it is not an unreasonable invasion of a third party's personal privacy to disclose personal information in compelling circumstances affecting anyone's health or safety, and
- **section 32(4)**, which provides for disclosure of third party personal or business information in the public interest.

It is therefore proposed that these provisions be amended to require that notice of the disclosure be given to the third party (and, in the case of **section 32(4)**, to the Commissioner) without specifying the method of giving notice.

Recommendation 19 That **section 17(2)** and **section 32(4)** be amended to require that public bodies give notice of the disclosure of third party personal or confidential business information, without specifying the manner of giving notice.

The *FOIP Act* has a general provision for giving notice "by means of a machine or device that electronically transmits a copy of a document, picture or other printed material by means of a telecommunications system" (**section 83(d)**). This provision could be understood to allow for the electronic transmission of information, but the wording seems to contemplate facsimile communication more than e-mail or electronic file transfer or other methods of electronic transmission. It is therefore proposed to amend **section 83** to clearly allow for notices or other documents to be given electronically.

Recommendation 20 That **section 83** be amended to harmonize with the *Electronic Transactions Act*.

DISCLOSURE OF INFORMATION IN ARCHIVES

Technical amendments

Disclosure by the Provincial Archives of Alberta

Recommendation 61 in the Final Report of the last Select Special Committee proposed a revision of the archives provision of the *FOIP Act* that would clarify for the research community how the principles that underlie the *Act*'s exceptions to disclosure would be applied within archives. A new part was added to the *Act* addressing both access and privacy (**Part 3**). In addition, a new provision was added to allow for research in the archives of post-secondary educational institutions.

After experience with the new provisions, some minor amendments have been proposed. It has been noted that the archives do not require their clients to establish that they are using the information "for research purposes," except in the case of disclosure under a research agreement. It should also be clarified, in accordance with standard archival practice, that all references to the time periods are based on the date of the record, not the date of the information in the record.

In addition, the provision concerning restrictions or prohibitions by other Acts of Alberta or Canada should be deleted. This provision was added to address Alberta statutes that prevail despite the *FOIP Act*, as well as federal paramountcies. However, the provision was drafted more broadly than intended and the existing paramountcy provision (**section 5**) is all that is needed.

Recommendation 21 That **section 43** be amended to

- make the reference to disclosure "for research purposes" apply only to disclosure under a research agreement,
- clarify that references to time periods are based on the date of the record, and
- delete the reference to restrictions or prohibitions by other Acts.

Disclosure by the archives of a post-secondary educational body

During the consultation with post-secondary educational bodies on proposed amendments to the archives provision, there was concern that post-secondary institutions should have some additional ability to promote archival research under a research agreement. It was intended to allow for a research agreement with less stringent requirements than are currently established in the FOIP Regulation.

In practice, post-secondary institutions have found that the requirements of research agreements under the *Act* are incompatible with the interests of researchers in disseminating the results of their research. It has been found that historical researchers and their audiences are mostly interested in personally identifiable

information rather than aggregate data. Since the provision for the archives of a post-secondary educational body is not meeting the needs of these institutions or their clients, it is proposed that this provision be deleted and that the *Act* have a single provision for all archives.

Recommendation 22 That the provision for the archives of a post-secondary educational body (**section 43(2)**) be deleted.

ADMINISTRATION OF THE *ACT*

Duty to publish directory

Section 87 of the *FOIP Act* requires the Minister to publish a directory of records to assist the public in identifying and locating records. The Alberta Directory was published in 1995, but has not been updated since then. A new edition has been planned twice, but on each occasion the project was deferred following a government reorganization.

The Special Select Committee that reviewed the *Act* in 1998-99 recommended in its Report (Recommendation 76) that a cost-benefit analysis be undertaken to determine whether the directory was the most cost-effective method of providing the information specified in **section 87**.

This question has been canvassed across Government and it is generally agreed that print publication of a directory is not cost-effective. The original concept of a directory pre-dated the development of web sites. There are now other methods of providing information about records holdings in Government that are more effective in terms of providing reliable, current information and offering a high level of service to the public.

It is proposed that Government Services maintain and publish a directory of public bodies subject to the *FOIP Act*, including a list of their FOIP Coordinators, on the Freedom of Information and Protection of Privacy web site, and that this directory be updated regularly.

There is a continuing need for a directory of personal information banks to support privacy protection, and it is proposed that each public body (not Alberta Government Services) should be responsible for publishing and maintaining this directory.

The requirements of the directory of personal information banks, which are currently more extensive for Government than for local public bodies, should be the same for all public bodies. It is suggested that the directory of personal information banks should include all the information currently required for all public bodies, i.e. title and location of the personal information bank; a description of the kind of personal

information and the categories of individuals whose personal information is included; and the authority for collecting the personal information.

All public bodies should in addition be required to include, at a minimum, the purposes for which the information is collected, used or disclosed (currently required for Government but not for local public bodies). The present additional requirement for Government to include the categories of persons who use the information or to whom it is disclosed should be encouraged in policy, but not required by the *Act*.

Recommendation 23 That the contents of the directory include only the name of the public body and contact information for the FOIP Coordinator and that this directory be published only in electronic form on the Freedom of Information and Protection of Privacy web site.

Recommendation 24 That each public body be responsible for maintaining and publishing a directory of its personal information banks in electronic or other form and that the directory for each public body include

- the title and location of the personal information bank,
- a description of the kind of personal information and the categories of individuals whose personal information is included,
- the authority for collecting the personal information, and
- the purposes for which personal information is collected, used or disclosed.

Review of the *Act*

Prior to the proclamation of the *Revised Statutes of Alberta, 2000*, the *FOIP Act*'s review provision (**section 97**) stated that a special committee of the Legislative Assembly must begin a comprehensive review of the *Act* within three years of the submission of the report of the previous special committee (i.e. by May 18, 2002). In May 1999, some local public bodies had no experience in administering the *Act*, and the review in 2002 was intended mainly to provide local public bodies with an early opportunity to comment and to propose changes.

The *FOIP Act* is working well and there are other initiatives, particularly in relation to private sector privacy, that are likely to require the attention of the Legislative Assembly. It has therefore been suggested that the next review should be scheduled to begin six years after the submission of the report of the present Select Special FOIP Act Review Committee.

A period of five years had been considered; however, given the expected time period between the coming into force of amending legislation and the beginning of the next review, an additional year was thought advisable to ensure informed comment. A period of six years is also thought desirable to allow for the possibility of harmonizing a review of the *FOIP Act* with a review of the *Health Information Act*, so that issues arising in bodies that are required to administer both Acts can be

considered at the same time. This would require consultation between the Minister of Government Services and the Minister of Health and Wellness. A period of six years would also allow for consideration of both Acts within the context of new private sector privacy legislation.

Recommendation 25 That **section 97** be amended to allow for a review of the *Act* to begin within six years of the submission of the report of the present Select Special Committee.

Technical amendment

Access to manuals

Section 89 of the *FOIP Act* requires public bodies to provide facilities where the public may inspect any manual, handbook or other guideline used in decision-making processes that affect the public.

This provision was drafted as a transitional provision, applying "within 2 years after this section comes into force" (**section 89(1)**). The intention was to allow a reasonable amount of time for implementation. The *Act* has now been in force for all sectors for more than two years, so there is no longer any need for the two-year grace period. If the *Act* were to be expanded to any other sector, time for implementation could be allowed for through the proclamation process.

Recommendation 26 That **section 89(1)** be amended to delete the phrase "within 2 years after this section comes into force."